

Exhibit A
Excerpts from October 20, 2009
Hearing Transcript

Exhibit to the March 12, 2010 Motion *In Limine* to Exclude Certain Evidence and Argument
Related to Plaintiffs' Damages Claim

<p style="text-align: right;">22</p> <p>1 causation is established by the fact that any reduction of</p> <p>2 1 percent or more of the Dey drugs will establish causation</p> <p>3 as to Dey, and as to the Roxane drugs, any reduction of</p> <p>4 1 percent or more.</p> <p>5 So this Court does not have to decide what is the</p> <p>6 appropriate "but for" AWP. You don't have to decide what's</p> <p>7 the appropriate spread, speed limit. All of our drugs have</p> <p>8 spreads way in excess of 30 percent. And so any reasonable</p> <p>9 reduction, any reasonably honest AWP would have affected the</p> <p>10 median. So we're not asking the Court to determine damages</p> <p>11 for us. So that's why I think this piece of our case -- and</p> <p>12 we're just talking -- this looks like \$3.52 as opposed to</p> <p>13 \$1.70 or something, but when this is multiplied out through</p> <p>14 the case, the effects are very substantial.</p> <p>15 I would like to jump to the last array in this</p> <p>16 time period, which is the third quarter of 2001. You can</p> <p>17 see on the screen, your Honor, this is a more sophisticated</p> <p>18 array. It's in a spreadsheet. Almost all of the arrays in</p> <p>19 this case were produced in electronic format, and therefore</p> <p>20 it's actually rather easy to substitute different numbers to</p> <p>21 see what happens, and I'd like to do that with a replicate</p> <p>22 of this array in Excel format.</p> <p>23 THE COURT: Where is this?</p> <p>24 MR. HENDERSON: This is a replicate of what you</p> <p>25 just saw.</p>	<p style="text-align: right;">24</p> <p>1 for Roxane products: Just lowering them by two cents would</p> <p>2 change the median and the allowed amount.</p> <p>3 Now, this impact exists, as I said, up through the</p> <p>4 third quarter of 2001. A declaration of Ian Dew -- let me</p> <p>5 just refer your Honor to the language of Carolyn Helton's</p> <p>6 declaration where she says -- I'm sorry -- with regard to</p> <p>7 both companies, that for this period, any reduction of</p> <p>8 1 percent or more in the AWP's of the Dey products would</p> <p>9 lower the median and the allowed amount. The same is true</p> <p>10 as to the Roxane products.</p> <p>11 And our consultant Ian Dew prepared a summary of</p> <p>12 the claims data. The claims data of the Cigna DMERC</p> <p>13 Region D claims for this product shows that about a million</p> <p>14 claims were paid by Cigna for ipratropium bromide; and of</p> <p>15 those, approximately 90 percent, over 900,000, were paid at</p> <p>16 either \$3.52 or 95 percent of that \$3.52, which is \$3.34.</p> <p>17 The rest of the paid claims, approximately 10 percent, were</p> <p>18 paid at an amount consistent with the provider's charged</p> <p>19 amount.</p> <p>20 Now, we have not moved for summary judgment for</p> <p>21 the time period after 2001 quarter three. At that point in</p> <p>22 time things are a little bit different, and I'm going to</p> <p>23 come back to this same spreadsheet and illustrate this</p> <p>24 because Dey has moved for summary judgment on a piece of the</p> <p>25 case which relates to our view that the combined impact of</p>
<p style="text-align: right;">23</p> <p>1 THE COURT: What I just saw was what number so I</p> <p>2 can follow it? In other words, Mr. Henderson, I'll never</p> <p>3 remember this tomorrow.</p> <p>4 MR. HENDERSON: That's right. This is a replicate</p> <p>5 of the page marked Page 35 of 74 of the same --</p> <p>6 THE COURT: Thank you.</p> <p>7 MR. HENDERSON: And for your information, in the</p> <p>8 bottom right-hand corner of the document is a footer, which</p> <p>9 was actually added for purposes of litigation, which shows</p> <p>10 the electronic production pathway, just for purposes of all</p> <p>11 parties to show exactly where that is, but that footer also</p> <p>12 identifies the year and the quarter when the array was in</p> <p>13 effect.</p> <p>14 In this particular replication that's on the</p> <p>15 screen, your Honor, I've eliminated a few or I've hidden a</p> <p>16 few columns so everything can fit on one page so I don't</p> <p>17 have to be looking around too much. But you'll see the</p> <p>18 cursor is on Dey's product, first product, package of 25s.</p> <p>19 And if that is lowered to just \$3.50, and I do that for each</p> <p>20 one, you can see the generic median here where I have the</p> <p>21 cursor went down from \$3.52 to \$3.51.</p> <p>22 The brand names are shown in this lower panel.</p> <p>23 The lowest brand is \$3.52, which is Roxane's ipratropium</p> <p>24 bromide NovaPlus drugs, but the allowable amount has changed</p> <p>25 to \$3.51. And the same is true if we changed the numbers</p>	<p style="text-align: right;">25</p> <p>1 Dey and Roxane must be considered.</p> <p>2 In short, after the third quarter of 2001, we can</p> <p>3 change the AWP's of Dey down to a penny, and it doesn't</p> <p>4 change the outcome, the median calculation. We can change</p> <p>5 the AWP's of Roxane down to 1 cents, and it still doesn't</p> <p>6 change the median calculation. However, if we change the</p> <p>7 AWP's, if we lower the AWP's of both Dey products and Roxane</p> <p>8 products by 1 percent or more, it does affect the median.</p> <p>9 And I think it's helpful to see why this happens,</p> <p>10 and what I'm going to do is go to a replicate of the next</p> <p>11 quarter when things change. This array is virtually</p> <p>12 identical with one exception: Apotex has entered the market</p> <p>13 with a new product. We can see that their AWP for a package</p> <p>14 of 25s is fairly high. It's \$4.48, which is higher than the</p> <p>15 Dey products and the Roxane products.</p> <p>16 Now, under Dey's theory of the case on which they</p> <p>17 seek summary judgment, because there is one more company</p> <p>18 that has entered the market with an inflated AWP, according</p> <p>19 to Dey, the United States cannot recover a penny because</p> <p>20 Dey's products in isolation do not affect the median;</p> <p>21 likewise, Roxane products in isolation do not affect the</p> <p>22 median; and, according to their view of the case, the United</p> <p>23 States' ability to prove damages and recover evaporates</p> <p>24 because one additional company has entered the market. And</p> <p>25 I would suggest to your Honor, that just cannot be. We have</p>

<p style="text-align: right;">26</p> <p>1 clearly demonstrated that these companies --</p> <p>2 THE COURT: Well, couldn't you get penalties</p> <p>3 anyway?</p> <p>4 MR. HENDERSON: Yes.</p> <p>5 THE COURT: So why does -- I mean --</p> <p>6 MR. HENDERSON: The False Claims Act allows us to</p> <p>7 recover our losses.</p> <p>8 THE COURT: When you say you can't collect a</p> <p>9 penny, I mean, wouldn't knowingly false presentation of</p> <p>10 claims money create a penalty situation even if you can't</p> <p>11 prove damages?</p> <p>12 MR. HENDERSON: Well, that would be our position.</p> <p>13 I'm sure the defense would argue that there's no causation</p> <p>14 because it wouldn't have affected the amount of the claim.</p> <p>15 THE COURT: So you still need the causation, even</p> <p>16 if it's completely false?</p> <p>17 MR. HENDERSON: We would probably have a disputed</p> <p>18 legal argument on that, your Honor, but I think it's evident</p> <p>19 that we have proven this demonstrates that Dey and Roxane</p> <p>20 combined have a large impact on the allowed amount. And the</p> <p>21 law doesn't leave us without a remedy for these losses,</p> <p>22 putting aside the civil penalty issue. The Restatement of</p> <p>23 Torts, Section 442-A, Comment D, I'll just read it for you,</p> <p>24 your Honor, quickly: "A force due to an act of a third</p> <p>25 person, which is wrongful toward another who is harmed, may</p>	<p style="text-align: right;">28</p> <p>1 proof of liability only with respect to one company; and</p> <p>2 when you substituted the arrays in that case, it didn't</p> <p>3 change the median. And in fact we followed that approach in</p> <p>4 the case of Dey with respect to its albuterol drug, a same</p> <p>5 drug. We didn't sue all of the other parties in there. And</p> <p>6 the damages we've calculated against Dey are very small,</p> <p>7 tens of thousands of dollars.</p> <p>8 THE COURT: You're saying the difference here is,</p> <p>9 there are two fraudulent actors, if you will?</p> <p>10 MR. HENDERSON: That's correct, and we've proven</p> <p>11 wrongful conduct on the part of both of them, and their</p> <p>12 combined impact establishes/demonstrates a big loss. And</p> <p>13 there can be no question, your Honor, that the Medicare</p> <p>14 program suffered substantial losses as a result of the</p> <p>15 combined impact of false pricing.</p> <p>16 THE COURT: Okay, since we only have ten minutes</p> <p>17 left, why don't you deal with the purple elephant in the</p> <p>18 room, which is the government knowledge defense. Does that</p> <p>19 apply to this drug?</p> <p>20 MR. HENDERSON: Well, we're talking about the</p> <p>21 Medicare context, so I suggest the government knowledge is</p> <p>22 really resolved to the government's favor by the First</p> <p>23 Circuit's recent decision, in which they effectively upheld</p> <p>24 your interpretation of "average wholesale price." Certainly</p> <p>25 all the government knowledge --</p>
<p style="text-align: right;">27</p> <p>1 be only a contributory factor in producing the harm. If so,</p> <p>2 both the actor and the third person are concurrently liable.</p> <p>3 This is true although the actor's conduct has ceased to</p> <p>4 operate actively and has merely created a condition which is</p> <p>5 made harmful by the operation of the intervening force set</p> <p>6 in motion by the third party's negligent or otherwise</p> <p>7 wrongful conduct."</p> <p>8 And then it goes on to say, your Honor, "However,</p> <p>9 while there is concurrent liability, the two forces are not</p> <p>10 concurrent causes, as that term is customarily used. To be</p> <p>11 a concurrent cause, the effects of the negligent conduct of</p> <p>12 both the actor and the third person must be an active and</p> <p>13 substantially simultaneous operation."</p> <p>14 And here we have the effects of the wrongful</p> <p>15 conduct of both Dey and Roxane in effect in simultaneous</p> <p>16 operation affecting the outcome of the median calculation.</p> <p>17 Just so I can highlight to you --</p> <p>18 THE COURT: You know, I struggled with this</p> <p>19 mightily in the big class action suit.</p> <p>20 MR. HENDERSON: Yes, I'm aware of that.</p> <p>21 THE COURT: I struggled with it, and there were no</p> <p>22 good cases on this. There's that sort of abstract</p> <p>23 Restatement of Torts language. It's a very hard issue.</p> <p>24 MR. HENDERSON: Well, in that case, of course,</p> <p>25 your Honor only had one company before it, and there was</p>	<p style="text-align: right;">29</p> <p>1 THE COURT: Well, that's absolutely true, they</p> <p>2 did. On the other hand, I didn't deal with -- I don't</p> <p>3 remember whether ipratropium bromide was on a list in the</p> <p>4 OIG reports and whether or not there was a DOJ price for</p> <p>5 them. I mean, it was different in those branded drugs</p> <p>6 factually, not in terms of the standard but factually.</p> <p>7 MR. HENDERSON: I understand, your Honor, and</p> <p>8 there have been -- there was one OIG report focusing on</p> <p>9 ipratropium bromide.</p> <p>10 THE COURT: In what year?</p> <p>11 MR. HENDERSON: I think it was the early 2000s.</p> <p>12 What was the year? 1998? Okay, I'll take Roxane's word for</p> <p>13 it.</p> <p>14 THE COURT: And what does it do? It lists the</p> <p>15 true price?</p> <p>16 MR. HENDERSON: It indicates -- it evaluates the</p> <p>17 discounts that were available in the market and discusses</p> <p>18 that the AWP's for ipratropium bromide were inflated.</p> <p>19 THE COURT: At the levels that you have them in</p> <p>20 that graph? Do you remember?</p> <p>21 MR. HENDERSON: I don't recall. There are some</p> <p>22 significant inflations there. But let's assume for argument</p> <p>23 that the OIG understood at that time and had some specific</p> <p>24 evidence that there was inflation in ipratropium bromide</p> <p>25 prices. Obviously, the government does not agree that an</p>